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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 16.

MISSOURI STATE LIFE INSURANCE COMPANY AND HARTFORD ACCIDENT & INDEMNITY COMPANY, *Petitioners.*

v.

MARION JOHNSON, *Respondent.*

REPLY BRIEF FOR PETITIONERS.

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REPLY BRIEF.

Counsel for respondent cite several cases in their brief, involving the constitutionality of State statutes which penalize carriers for delay in the payment of claims for assessing moderate attorney's fees as costs. These cases are manifestly without application to the question which is presented here.

The case of Meeker vs. Lehigh Valley R. R. Company, 236 U. S. 412, throws no light whatever upon the question which is now before the court. In that case it seems that the Interstate Commerce Commission had made an order that the Railroad Company should pay a certain amount to Meeker & Company as reparations for unjust charges. The Railroad Company refused to comply with the order. Suit was filed in the district court to enforce the order. This court said:

> "And Sec. 16, relating to actions to enforce claims for damages after the Commission has acted thereon provides 'If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit'."

The only questions presented were whether the fee allowed was excessive and whether the provision for an attorney's fee was invalid as being arbitrary. In determining such questions, this court said:

> "It requires that the fee be reasonable and fixed by the court, and does not permit it to be taxed against the carrier until the plaintiff's demand has been adjudged upon full inquiry to be valid. In these circumstances the validity of the provision is not doubtful but certain."

Not only was there no question as to whether the attorney's fee liability should be included for jurisdictional purposes, but the statute, by its terms, postponed all liability until after an adjudication by the court.

Counsel try to escape the plain meaning of the statute which is now before the court, and at page 18 of their brief, have this to say:

> "That the fee is an incident to the litigation, and not an integral part of the cause of action, is shown by the fact that the right to the fee attaches only after the right to enforce the asserted policy liability has been adjudicated in favor of the plaintiff. The trial of a suit under Sec. 6155 presents two successive stages: (1) A determination by the jury of the plaintiff's right to enforce the claimed policy liability; and, upon the return of a verdict awarding such right, and not until then, (2) the entry by the court of a judgment awarding the attorney's fee. (See Marginal note below.)
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> "If the jury returns a verdict for less than the amount claimed by the plaintiff, he is awarded no attorney's fee. Pac. Mut. Life Ins. Co. v. Carter, 92 Ark. 378, 123 S. W. 384. There can be no doubt that the

determination of the 'controversy' in litigation is anterior to the award of the fee; and that the award of the fee is an incident to the determination of the controversy."

There is no foundation whatever for this argument. Section 6155 Crawford & Moses' Digest of the Statutes of Arkansas plainly states that upon failing to pay within the time specified in the policy, after demand made therefor, "such company shall be liable to pay to the holder of such policy in addition to the amount of such loss, twelve per cent damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said loss" etc. We are unable to find the basis for counsel's statement that "the right to the fee attaches only after the right to enforce the asserted policy liability has been adjudicated in favor of the plaintiff."

The statute in so many words says that liability shall attach upon failure to pay within the time fixed by the policy. Such is the construction placed upon this statute by the Supreme Court of Arkansas, in the very recent case of Missouri State Life Insurance Company vs. King, 186 Ark. 893, 57 S. W. (2d) 400. In that case the plaintiff submitted proofs of disability. The defendant asked for an opportunity to have the plaintiff examined by a physician. The plaintiff consented, but before the examination was completed he filed suit, claiming the face amount of the policy, the statutory penalty, and a reasonable attorney's fee. The physician's report having shown that the plaintiff was totally disabled, the defendant answered, admitted liability for the face amount of the policy, but contested the claim for the statutory penalty and attorney's fee. Upon appeal it was contended by the plaintiff that liability attached immediately upon receipt of proofs of disability at the home office of the defendant and that it was not even entitled to a physical examination. The court held that the plaintiff having consented to submit to an examination that liability

would not attach until after the examination was completed and the defendant has refused to pay. The following quotations are taken from the court's opinion:

> "We are not required to decide whether, in all cases or in any case, an insured is required to submit to an examination by the Company physician, the policy not having imposed that requirement. But here, whether required to do so or not, the insured had so agreed, and he appears to have been responsible for such delay as occurred in connection with his examination.
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> "We are of the opinion, however, and do decide, that the proof of disability furnished by the insured was not conclusive of that fact. The company had the right to make an investigation. Disability is not a fact, like that of death, which either exists or does not exist. It may be, and frequently is, a question about which there is a doubt, and, if the company had the right to investigate this fact, it was, of course, entitled to a reasonable time within which to exercise the right. This investigation should be made expeditiously and in good faith, but the undisputed testimony shows both expedition and good faith."
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> "The language of our statute imposing a penalty and an attorney's fee applies only when payment is refused at the time specified in the policy for the payment to be made, and our construction of the policy here sued on is that the payment was due, not upon the filing of the proof by the insured, but 'at the time of the approval by the company of the proofs as aforesaid,' filed by the insured with the company. In this connection, we repeat that this approval was due when the company, acting expeditiously and in good faith, had been afforded a reasonable opportunity to investigate the proofs submitted."

The language of the statute is plain and unambiguous, and the Supreme Court of Arkansas has said that the liability for the attorney's fee attaches at the time payment is refused as specified in the policy. Therefore we say

that counsel for respondent have ignored the plain language of the statute when they say that the fee attaches only after the right to enforce the policy liability has been adjudicated.

In a footnote at page 18 of their brief, counsel call attention to the fact that the attorney's fee was assessed at a separate hearing. Under the terms of the statute, both the attorney's fee and penalty are assessed by the court. The supplemental hearing was merely to determine what would be a reasonable attorney's fee under the circumstances. That counsel for respondent considered the liability for the attorney's fee to exist prior to the time they filed suit is evident from the allegations of the complaint and the amendment to the complaint. The allegations contained in the complaint are as follows:

> "By reason of the statutes of the State of Arkansas therein made and provided to cover cases such as this, the defendant is also liable to pay plaintiff an amount equal to 12% of the principal sum and interest owed plaintiff by way of penalty, and a reasonable attorney's fee for the prosecution and collection of the same." (R. 8.)

In the amendment to the complaint we find this allegation:

> "By reason of the statutes of the State of Arkansas therein made and provided to cover cases such as this, the defendant is also liable to pay the plaintiff a reasonable attorney's fee for his attorneys herein for the prosecution and collection of the sum due herein, which should be taxed as costs in this action." (R. 9.)

It is this liability, prior to adjudication that makes the attorney's fee a part of the amount in controversy. Costs, in the true sense, accrue during the progress of a litigated case. A liability for costs prior to the institution of a suit is inconceivable.

The auditor's fee in the case of In re Peterson, 253 U. S. 300 was an expense which was incurred during the progress of the litigation. There was no liability on the part of the unsuccessful litigant until final judgment was rendered.

Counsel cite the case of Pacific Mutual Life Insurance Company vs. Carter, 92 Ark. 378, 128 S. W. 384, in support of their contention that liability for the fee attached only after the right to enforce the asserted liability has been adjudicated in favor of the plaintiff. In that case the plaintiff had demanded and sued for $1,666.66, which was more than he was entitled to receive from the defendant. The judgment which he obtained was for less than the amount he had claimed in his complaint. The court refused to assess an attorney's fee and penalty at all, saying that to do so when the plaintiff makes an unwarranted claim would render the statute unconstitutional. If the demand was excessive the liability for the attorney's fee and penalty did not attach at all. The following quotations from the opinion leave no doubt as to the holding in this case:

> "This court has declared valid the statute allowing a penalty and attorney's fees as against fire insurance companies in Arkansas Insurance Co. v. McManus, 86 Ark. 115. The statute includes accident insurance companies, and there is no exception in favor of mutual accident insurance companies. See Acts 1905, p. 307.
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> "But the act makes the company liable for failure to pay the loss 'after demand made therefor.' The statute thus contemplates that there shall be a demand. A recovery for penalty, and attorney's fee cannot be had when complainant makes demand for more than he is entitled to recover. It could never have been the purpose of the Legislature to make the insurance companies pay a penalty and attorney's fee for contesting a claim that they did not owe. Such an act would be unconstitutional. The companies have the right to resist the payment of a demand that they do not owe. When the plaintiff demands an excessive amount, he is in the wrong. The penalty and attorney's fee is for the benefit of the one who is only seeking to recover after

demand what is due him under the terms of his contract, and who is compelled to resort to the courts to obtain it. The appellee, by asking judgment for $1,444.44 concedes that he was demanding more in his complaint than he was entitled to receive. The judgment for the penalty and attorney's fee is therefore set aside, and the judgment of the circuit court will be affirmed for $1,444.44, with interest from date of judgment at 6 per cent."

As liability attaches upon failure to pay within the time specified in the policy, and without regard to any judicial proceeding it is, in substance, a part of the amount in controversy, and to label the item as "costs" at a later date cannot interfere with the right of removal.

A contention similar to the one which is pressed by counsel for respondent was before this court in the case of Brown vs. Webster, 156 U. S. 328. In that case there was a claim for damages on account of a breach of warranty. The measure of damages was the purchase price with interest from the date of payment. The total of the amount of the payment and the interest brought the suit within the jurisdiction of the Federal Court. It was contended that in as much as part of the claim was an item labeled "interest" it could not be considered in making up the jurisdictional amount. The court held that this was not "interest" within the meaning of the legislation which excluded that item in fixing the jurisdiction of the Federal Court.

Under the provisions of Section 6155 of Crawford & Moses' Digest of the statutes of Arkansas, the liability for the twelve per cent penalty and attorney's fee are contemporaneous. The Supreme Court of Arkansas holds that a suit involving $3,000, plus the statutory penalty is removable. In this case it held that a suit involving $3,000 plus a reasonable attorney's fee was not removable, solely because the statute which fixed the liability said that it should be taxed as costs. In substance the liabilities are the

same. If the statute had provided that the penalty should also be taxed as costs, then the Supreme Court of Arkansas would, by similar process of reasoning, say that a suit for $3,000, plus the statutory penalty of 12 per cent could not be removed to the Federal Courts. Carrying the analogy a little further, the legislature could provide that 50 per cent of all amounts recovered in the state courts should be taxed as costs, and thereby further impair the right of removal.

We respectfully submit that the right to remove to the Federal Court which is conferred by the statutes of the United States is not to be diminished by a mere label which is applied under a state statute to a part of the liability which is enforced.

Respectfully submitted,

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